IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DARLENE MARIE ARCHIBALD,

OPINION AND ORDER

Plaintiff,

10-cv-558-bbc

v.

ASPIRUS, INC.,
ASPIRUS VNA HOME HEALTH, INC.,
ASPIRUS VNA EXTENDED CARE, INC.
and BARBARA MOSKONAS AUSTIN,

Defendants.

- -

Plaintiff Darlene Archibald filed this civil suit for money damages, alleging that defendants Aspirus, Inc., Aspirus VNA Home Health, Inc., and Asprirus VNA Extended Care, Inc. violated her rights under Title VII (42 U.S.C. § 2000e-2), under 42 U.S.C. § 1985(3) and under Wisconsin tort law when they terminated her from her jobs as home health aide and supportive home care worker. Plaintiff alleged in addition that defendant Barbara Moskonas Austin interfered intentionally with her at will employment contract with the Aspirus defendants, in violation of state law.

In an order entered on April 13, 2011, I dismissed all of plaintiff's claims with the

exception of her federal claim that the Aspirus defendants discriminated against her on the basis of her religion when they terminated her and her state law claim that defendant Austin had interfered with her at will employment. The case is before the court now on defendants' motion for summary judgment on the two remaining claims. The motion will be granted. The undisputed evidence shows that plaintiff was not subjected to religious discrimination by defendants and that defendant Austin did not interfere improperly with plaintiff's employment.

Before setting out the undisputed facts, two comments about the way the parties handled their motions for summary judgment may be helpful to them in preparing future motions in this court. First, plaintiff should have taken more care with her filing of exhibits. She did not make things easy for the court when she filed summary judgment exhibits in no discernible order without following a uniform numbering system (some of the exhibits were numbered, some were lettered and some were both numbered and lettered), used the same number for more than one exhibit and used different numbers (or letters) for the same exhibit. 82 of the docket entries for this case consist of or are related to plaintiff's exhibits in support of her brief in opposition to defendants' motion.

Second, both sides made things more difficult for themselves and for the court when they did not cite their own proposed findings of fact in their briefs. Instead, they cited evidence that they believed supported the assertion they were making in the brief, requiring

the court to check each assertion in the brief to determine whether it had been properly proposed as fact so that it could be relied upon in deciding the motion. The Helpful Tips that accompany the Procedures for Filing Summary Judgment Motions sent to counsel make it clear that "[a]ll facts necessary to sustain a party's position on a motion for summary judgment must be explicitly proposed as findings of fact." The Procedures warn the parties that "[t]he court will not consider facts contained only in a brief." I.B.4.

By complying with the Procedures, counsel would have provided their opponent a fair opportunity to respond to the proposed fact. Equally important, they would not have wasted time arguing matters never proposed as facts, but would have realized when they searched for a citation in support of the fact that it had not been proposed as a fact and could have corrected the omission. Instead, both sides devoted many pages of their briefs to matters never proposed as fact, such as the details of a cultural and religious diversity training session for employees or what went on at the unemployment compensation hearing. As a result, I have had to ignore many of the arguments they made in their briefs.

From the facts that were proposed properly, I find that the following are both undisputed and material.

UNDISPUTED FACTS

A. Parties

Plaintiff Darlene Marie Archibald was employed by the Aspirus defendants and their predecessors for 19 years. During the time she worked for them, plaintiff held two separate positions simultaneously: Home Health Aide with defendant Aspirus VNA Home Health, Inc. and Supportive Homecare Worker with Aspirus VNA Extended Care, Inc. (henceforth Home Health and Extended Care). The Aspirus defendants are health care providers in north central Wisconsin. At all times, plaintiff's employment was terminable at the will of her employer.

Plaintiff's religion is Roman Catholic. It is her sincerely held religious belief that she should conclude each conversation with the words, "God bless you" or "I'll pray for you." She believes that she should discuss her faith with others whenever they ask her about it.

At relevant times, Julie Riemer, Karla Huber and Sarah Goetsch were employed by Home Health as RN Regional Supervisors. Each supervised plaintiff when plaintiff was working as a home health aide.

At all relevant times, defendant Barbara Austin was employed by Extended Care as a supervisor. In that position, she supervised plaintiff when plaintiff was working as a supportive homecare worker.

At all relevant times, Linda Hackbarth was employed by Aspirus, Inc. as a Human Resources Manager and was the Human Resources Leader for defendants Home Health and

Extended Care. She provided these entities human relations counseling on various matters, including discipline, consulting routinely with them about employment and disciplinary matters involving plaintiff. She was familiar with Asprirus's policies and procedures.

B. Employment Policies

Aspirus has an equal employment opportunity policy that specifically prohibits discrimination on various bases including religion. It also has an employee Code of Conduct Disciplinary Policy and Procedure that sets forth the various forms of disciplinary action that may be taken against employees that violate its policies and procedures. Aspirus provides training to its managers, supervisors and employees on human relations subjects, including the prohibition on discrimination and harassment in the workplace, cultural diversity and other equal employment opportunity subjects.

Aspirus has a non-discrimination/harassment policy that requires that all employees be treated with respect and dignity and prohibits discrimination and harassment on various bases, including religion. Under the policy employees have the right to decline to provide patient care if doing so would conflict with the employee's cultural values or religious beliefs.

Aspirus has a Patient/Client Relations Policy establishing guidelines for appropriate employee relationships with patients and clients. Among other things, employees are prohibited from engaging in offensive conversations with a patient or a client. If employees

are uncertain about whether an act is prohibited under the policy, they are to discuss it with their supervisor. Central to this policy is the concern that conversations on charged subjects may have a negative effect on patient health and comfort.

Plaintiff received a copy of the Patient/Client Relations Policy. She understood from this policy that talking about religion can be offensive to people. Hackbarth told her about this again in 2006 and reminded plaintiff that conversations of this kind violated the patient/client relations policy.

C. Disciplinary Actions against Plaintiff

1. 2004 written counseling

In late May or early June 2004, defendant Austin received reports of two incidents involving plaintiff. The first involved plaintiff's alleged failure to report an open wound on a patient's foot; the second involved her decision to take care of a patient's dog while the patient was having surgery. Apparently, the patient's brother had asked her for the dog and she had refused to release it to him. Austin investigated the two incidents and concluded that plaintiff had exercised poor judgment in not making a timely report of the wound and in the manner in which she handled the patient's dog. Austin gave plaintiff written counseling and a performance plan dated June 15, 2004. Austin wrote that the "two incidents were thoroughly investigated and [plaintiff] was found innocent of any unlawful

act but both show poor judgment on [her] part."

Shortly after the counseling, plaintiff received her annual performance evaluation, which showed her meeting or exceeding performance standards, except in the area of teamwork, for which she received a rating of "provisional/satisfactory" in the category of "demonstrates respect for co-workers as evidenced on co-worker feedback forms."

2. 2006 disciplinary warning

In November 2006, Riemer (plaintiff's Home Health supervisor) received a telephone call from a relative of a patient under plaintiff's care, complaining about plaintiff's engaging in inappropriate conversations regarding her views on a particular religion. After Riemer consulted Hackbarth about the incident, the two met with plaintiff on November 21, 2006, to discuss the relative's complaint. They also talked about what they considered an inappropriate message that plaintiff had left on Riemer's voicemail, in which plaintiff had said that she had provided religious information to a patient and then added in an angry tone that Aspirus could go ahead and fire her. Plaintiff admitted having left the voicemail message.

Hackbarth and Riemer told plaintiff that under Aspirus's Patient/Client Relations Policy it was not appropriate for her to discuss her opinions on religion with patients. They directed her to refrain from having inappropriate conversations with patients or patients'

family members. They discussed with plaintiff the appropriate way to handle requests from patients for religious information, which was to give patients the name and telephone number of a professional counselor who was knowledgeable about religion.

Hackbarth and Riemer documented the counseling session in a November 27, 2006 letter to plaintiff, which plaintiff received. Riemer would have had the same conversation with plaintiff, regardless of plaintiff's particular religious beliefs, any time she learned that plaintiff was engaging in conversation about religious matters that could make patients uncomfortable.

When plaintiff received the November 27, 2006 disciplinary warning, she understood that it was inappropriate to say "God Bless You" or "I will pray for you" to patients. Nevertheless, she continued to make such comments up until the time of her dismissal.

3. April 2007 disciplinary counseling

In April 2007, Karla Huber (plaintiff's supervisor) learned that plaintiff had called a scheduler from a patient's home phone to request additional home visits for a patient. Huber told Sarah Goetsch, plaintiff's direct supervisor, about the use of the phone and asked her to talk to plaintiff about it. Goetsch talked to plaintiff, who denied making the call from the patient's home.

Goetsch checked with the scheduler, Crystal Dammann, to ask whether plaintiff's call

had come from a patient's home telephone. Dammann confirmed that it had. Thereafter, Goetsch met with plaintiff and gave her a written counseling action dated May 17, 2007, along with a copy of the then-current Code of Conduct Policy. She made a formal referral to the Employee Assistance Program for plaintiff because of her alleged lying. Exh. 28, dkt. #133-2.

Goetsch advised Hackbarth of the disciplinary counseling action against plaintiff relating to her lack of honesty in reports, lack of trust in her leadership and problems with accountability in following up with RN case managers. Home health aides are instructed that as a general rule they are not to use a patient's personal telephone because doing so may result in telephone charges to the patient. Also, it is the responsibility of the RN to set up the number of home visits for a patient.

Initially, plaintiff denied having made the call from the patient's home, but an investigation showed that she had. Plaintiff understood that she was being disciplined in part for her dishonesty and not for anything tied directly to her religion.

4. June 2007 decision-making leave

On or about June 20, 2007, defendant Austin received a call from a hospice worker reporting that plaintiff had been having religious conversations with a hospice patient and that a family member had complained about plaintiff's talking too much about religion.

Defendant Austin was aware of plaintiff's previous discipline in November 2006 for inappropriate religious comments. She reported the conversation with the hospice worker in an email to Goetsch, plaintiff's home health care supervisor. Goetsch consulted with Hackbarth about the problem. The two decided to recommend placing plaintiff on a decision-making leave for conduct similar to the conduct that had resulted in the November 2006 disciplinary action. They met with plaintiff on June 26, 2007 to discuss the patient complaint and the disciplinary action. Hackbarth presented plaintiff a document directing her to refrain from inappropriate conversations about religion with patients, their families and her co-workers. They told plaintiff that after she completed her decision-making leave she was to advise Goetsch whether she would agree to continue her employment by complying with the specific expectations listed in the decision-making leave document.

On June 27, 2007, plaintiff faxed Aspirus a copy of the document with a large X through it and an attached note, in which she stated in part: "I expect to return to work without anyone's permission or agreeing to anyone's conditions or expectations." Hackbarth and Goetsch met with plaintiff again on June 28 to discuss her response. They talked about her perception that they were "badgering" or harassing" her and about her co-workers' objections to plaintiff's handing out religious materials at the workplace. They also talked more about the need for plaintiff to refrain from religious conversations with clients during and after work hours. When plaintiff denied having religious "conversations" with plaintiffs,

Hackbarth and Goetsch agreed to amend the document by adding "comments, words, or" before the word "conversations." They also agreed to add language to the document to make it clear that plaintiff was not to distribute religious materials to co-workers during working hours. Plaintiff agreed to comply with Aspirus's expectations as they were explained to her by Hackbarth and Goetsch. The two asked plaintiff to tell them in writing how she intended to meet the expectations in the amended decision-making leave document.

Hackbarth wrote plaintiff on June 29, summarizing the June 26 and June 28 meetings. She noted that they had discussed concerns from co-workers about plaintiff's bringing religious material into the office and that they had agreed that these concerns were not part of the discipline, but that they wanted to be clear that this was not appropriate.

In the June 29, 2007 letter Hackbarth noted that she had added three paragraphs to the decision-making leave document and she told plaintiff that by signing the letter, she would be expressing her agreement that the information in the letter had been discussed with her on June 26 and June 28 and her understanding that if she failed to meet the expectations, she would be subject to further discipline, up to and including discharge; she had received a copy of the Code of Conduct and Patient/Client Relations policy and understood that if she had any questions relating to any job performance expectation, it was her responsibility to speak with her supervisor to resolve the question immediately; and she had received a copy of the decision-making leave document and understood that the discipline was confidential

and should not be discussed with clients.

Goetsch and Hackbarth met with plaintiff on July 3, 2007 to discuss the amended decision-making leave document. They gave plaintiff a copy of the document and Hackbarth's June 29 letter. Plaintiff signed the amended document, adding the words "under duress." Hackbarth and Goetsch gave plaintiff a copy of the policies referred to in the amended document and discussed with her the emails she was sending others that contained disparaging comments about Hackbarth and Goetsch. They advised plaintiff that if a patient asked her to pray for the patient, she could respond that she would do so. Plaintiff said that she wanted to be able to offer to pray for a patient even if the patient did not ask her to; Hackbarth and Goetsch told her that she was not to do so because it might make the patient uncomfortable.

Hackbarth and Goetsch asked plaintiff for the action plan they had discussed at the June 28 meeting. Plaintiff said that on the advice of counsel, she had not prepared one. She was given a deadline of July 6, 2007 for submitting it. Hackbarth and Goetsch reported the events of the meeting to defendant Austin, who asked them to talk to an Aspirus employee who had expressed concerns about plaintiff's distribution of religious materials to co-workers in the workplace.

In a July 5, 2007 letter to Hackbarth and Goetsch, plaintiff agreed that if religion came up in a conversation with clients, she would give the client the appropriate contact

information, whether the conversation took place during work hours or afterwards; if the subject came up with co-workers during work hours, she would make arrangements with them to talk about it after hours if the co-workers were interested; she would not distribute religious materials to clients at any time; and she would not distribute religious materials to co-workers during work hours. On July 31, 2007, Goetsch told plaintiff that she had received four voicemail messages forwarded to her by plaintiff's co-workers and that all the messages had ended with the words, "God bless you." Goetsch reminded plaintiff of her prior discipline, her action plan and her need to show improvement.

5. April 2008 written counseling

On April 4, 2008, Hackbarth and Karla Huber met with plaintiff to discuss a complaint from the mother of a juvenile patient named Jacob. Plaintiff acknowledged that she had told the mother that she did not want to work with Jacob and that she found the situation difficult. Huber told plaintiff that, stressful as home care could be, plaintiff did not have the option of refusing to care for certain patients. The three agreed that plaintiff would go back to Jacob's home with a supervisor and another home health aide to observe a way of helping Jacob shower that would be consistent with his mother's wishes. Hackbarth and Huber summarized the meeting in a memorandum.

Plaintiff understood that Jacob's mother had talked with Aspirus about her concerns

and that the written counseling she received for the incident was based upon the way she handled the matter with Jacob's mother and for being overly argumentative with her supervisor in a telephone conversation about the incident.

6. July 17, 2008 termination

On June 24, 2008, defendant Austin received a call from a Portage County social worker, Trista DeRosa, complaining about plaintiff's relationship with a client, D.B., whom plaintiff was helping in her capacity as a supportive homecare worker. DeRosa reported that plaintiff had done no work during the time DeRosa was visiting D.B. Austin spoke with plaintiff on the same day, telling her she needed to use her time at D.B.'s house more effectively. DeRosa called defendant Austin a second time to ask whether she had spoken to plaintiff because D.B. had been complaining about plaintiff's "attitude" toward her and thought that it was because plaintiff believed D.B. had reported her for providing poor care. D.B. told DeRosa that plaintiff had told her that someone had complained about the care she was giving D.B. D.B. told DeRosa that plaintiff had complained about having to wash off feces from D.B.'s buttocks; DeRosa told Austin about the complaint.

Defendant Austin was concerned that plaintiff had retaliated against D.B. Austin considers it important that clients be free to report their concerns about their care and treatment without fear of reprisal. She talked to D.B. to discuss DeRosa's report; D.B.

confirmed that plaintiff had complained about washing feces off D.B. D.B. told Austin that she loved plaintiff's care, but thought plaintiff's attitude needed to be better. She told Austin also that plaintiff had complained to D.B. that she was not being properly compensated for her work and that she believed she was always given the hardest jobs. D.B. added that although plaintiff had had an "attitude" the previous week, she seemed better during the following week. D.B. urged Austin not to tell anyone about the information she was reporting because she was concerned that plaintiff would retaliate against her for her criticisms of plaintiff.

Austin summarized her conversations with D.B. in an email to Hackbarth. She included a statement purportedly from DeRosa to the effect that "being as good a Catholic as [plaintiff] claims to be, she sure isn't acting like it."

Hackbarth received Austin's email on July 1, 2008. She emailed Austin, suggesting that plaintiff's discipline proceed to the next level. Austin arranged a meeting with plaintiff, Huber and a Human Relations representative, Tera Neuendank, who attended in place of Hackbarth, to discuss the recent concerns raised by D.B. and D.B.'s social worker. Before the meeting, Hackbarth provided information to Neuendank about prior discipline imposed on plaintiff. In addition, Neuendank reviewed plaintiff's disciplinary record and spoke with her supervisors.

The meeting with plaintiff took place on July 17, 2008. Neuendank explained to

plaintiff the reports from DeRosa and D.B. about plaintiff's complaints and treatment of D.B., her discussions with D.B. about her pay and her job duties and the potential retaliation against D.B. for complaining about plaintiff. Plaintiff said that she did not remember making the comments to D.B., including the one about wiping off feces, but said that if she had, she was sorry. She apologized several times more. Austin, Huber and Neuendank decided that plaintiff should be discharged and told her so at the meeting. They told her that the reasons for the decision were the complaints from D.B., as well as other complaints from clients and family members.

Plaintiff was terminated on that date and escorted from the building, in conformance with policy. Neuendank summarized the reasons for the termination in a July 28, 2008 letter to plaintiff.

Hackbarth is familiar with disciplinary actions taken against employees who have worked for the Aspirus defendants or are still working for them. She is not aware of any employee who had a disciplinary record similar to plaintiff's who was not terminated.

Plaintiff distributed items of a religious nature to clients, including Catholic Christmas cards, birthday cards and Easter cards. She distributed religious literature to her co-workers about the Catholic position on euthanasia and she gave such an article to a client.

At all times between 2004 and July 17, 2008, defendant Austin was plaintiff's supervisor when plaintiff was working as a supportive homecare worker for defendant

Extended Care. She was aware that plaintiff worked simultaneously as a home health aide for Home Health. Because plaintiff worked in both capacities, Austin routinely disclosed information about plaintiff to supervisory staff at Home Health, as she had been directed to do for all personnel matters involving discipline. She did so as a matter of course with all of the employees she supervised. All of her contacts with Human Resources and with Hackbarth in particular regarding plaintiff and all of her contacts with supervisors at Home Health were undertaken in furtherance of her supervisory responsibilities. She forwarded emails, voice mail messages and complaints about instances of plaintiff's allegedly improper discussion of religion to Hackbarth and Goetsch because the subject matter related to the supervision and discipline of plaintiff.

OPINION

A. Discriminatory Discharge

Plaintiff's claim of discriminatory discharge is based on her belief that defendant Austin, Hackbarth and others disciplined her and eventually terminated her because of their anti-Catholic animus. A party alleging discrimination in employment can use either the direct or the indirect method of proof. The direct method includes both direct evidence and circumstantial evidence. Plaintiff does not argues that she has any direct evidence that defendants discharged her because of an anti-Catholic animus, but she argues that she has

circumstantial evidence that would allow a rational trier of fact to reasonably infer that defendants had fired her because she is a member of a protected class. Troupe v. May Dept. Stores Co., 20 F.3d 734, 737 (7th Cir. 1994). A plaintiff may make this showing with circumstantial evidence, which might consist of "ambiguous statements, suspicious timing, discrimination against other employees, and other pieces of evidence none conclusive in itself but together composing a convincing mosaic of discrimination against the plaintiff." Id. Not just any pieces of evidence will suffice; when added together, they must "'point[] directly to a discriminatory reason for the employer's action.'" Adams v. Wal-Mart Stores, Inc., 324 F.3d 935, 939 (7th Cir. 2003).

Plaintiff may also try to prove her case by using the indirect method by adducing evidence that she is a member of a protected class; her performance met her employer's legitimate expectations; she was subjected to an adverse employment action; and similarly situated employees outside her protected class were treated more favorably. Faas v. Sears, Roebuck & Co., 532 F.3d 633, 642 (7th Cir. 2008). If she can make this showing, the burden will then be defendants to prove that it had a legitimate, non-discriminatory reasons for the termination. Id. at 643.

1. Direct method of proof

Plaintiff relies heavily on defendant Austin's July 1, 2008 email to Hackbarth, which

she says was used "as the underlying investigative document by which the grounds were laid in order to terminate" her, Plt.'s Br., dkt. #113, at 5. This may be true, but plaintiff has not connected the email to any evidence of religious animus. She tries to do so by referring to Austin's repetition of two comments that Austin attributes to D.B. and to D.B.'s social worker about plaintiff's failings as a Catholic: DeRosa's comment that "for being as good a Catholic as [plaintiff] says she is, she sure isn't acting like it" and D.B.'s alleged comment, "with how religious [plaintiff] is, [I] can't believe how bad her attitude about life is." (Neither side proposed as fact that the email contained this comment by D.B. but I will address it because it can be considered along with the comment from DeRosa.)

Plaintiff characterizes these two remarks as "stereotypical Catholic/Christian slurs," but that is stretching the concept of a religious slur. Stereotypes, yes, and personal slurs about plaintiff, but hardly examples of anti-Catholic bias. It makes more sense to interpret them as expressions of disappointment that plaintiff is not living up to the positive values the speakers associate with her religion. More to the point, it was not defendant Austin who made the remarks. Plaintiff has not shown that either Austin or the other defendants shared the opinions expressed in the email or that if they did, the opinions colored their termination decision.

Plaintiff includes in her collection of circumstantial evidence Hackbarth's quick response to Austin's email about the complaints from D.B. and D.B.'s social worker; Austin's

inclusion in the email of alleged lies, fabrications and religious slurs; plaintiff's denial of some of the allegations in the email; and Austin's failure to ask plaintiff her side of the D.B. story. The alleged religious slurs are those discussed above; the alleged lies and fabrications are Austin's report of D.B.'s comments and those of her social worker as facts.

In February 2011, plaintiff and two investigators visited D.B. at her home and persuaded her to sign an affidavit in which she stated that she had never made the complaints about plaintiff that her social worker reported to defendant Austin. Plaintiff argues that this affidavit shows that defendant Austin lied when she passed on to others the comments of D.B. and her social worker. Defendants contend that this affidavit is not legitimate because of the circumstances under which it was obtained. It is not necessary to determine defendants' contention is correct. Even if plaintiff is right that Austin did fabricate the reports about plaintiff's neglect of her duties, her "attitude" and her complaints, plaintiff has not shown that such a fabrication would "point directly to a discriminatory reason for [defendant Austin's] action." Adams, 324 F.3d at 939.

It is not a reasonable inference from the undisputed facts to conclude that defendant Austin, Hackbarth and Neuendank initiated or participated in the decision to discharge plaintiff because of anti-Catholic animus. Nothing in the undisputed facts would allow a jury to find that any of the three had any hostility toward Catholics. Austin took no disciplinary action against plaintiff for inappropriate discussions about religion, although she did refer a

complaint about plaintiff from a hospice worker to plaintiff's home health care supervisor. A quick response to a complaint of inappropriate conduct around a client does not suggest religious animus. Even the alleged fabrication of plaintiff's shortcomings implies nothing by itself; if it occurred, it could just as easily be attributable to carelessness, a personal dislike of plaintiff or something else entirely. Any suggestion that it was religiously based is further undercut by the fact that neither the final incident that led to plaintiff's termination nor the previous incident with Jacob had anything to do with plaintiff's religious views.

Plaintiff seems to think that because her employers disciplined her for talking about religion in the workplace they exhibited religious animus and are guilty of discrimination, but she is wrong. Defendants had a legitimate reason to prohibit employees from discussing their religious views in the workplace; such conversations could be disturbing to patients, clients and co-workers either because they thought their own religious beliefs were being denigrated or because they do not want to engage in discussions about topics they find controversial. So long as the prohibitions applied to all employees, and plaintiff has not shown that they did not, defendants were within their bounds in imposing and enforcing them. (To the extent plaintiff is arguing that defendants did not reasonably accommodate her religious views, that claim was dismissed earlier in this case because plaintiff failed to exhaust it.)

2. Indirect method of proof

Plaintiff contends that she can show that she was treated differently from other employees of Aspirus who were similarly situated but who were not Catholic. A jury could find in her favor if she could show that she was a member of a protected class; she was performing her job satisfactorily; she experienced an adverse employment action; and other similarly situated employees were treated more favorably than she was. Faas, 532 F.3d at 641; Traylor v. Brown, 295 F.3d 783, 788 (7th Cir. 2002). Her Roman Catholic affiliation suffices to show that she is a member of a protected class for the purpose of her claim of religious discrimination and it is undisputed that she experienced an adverse employment action. However, she was not performing her job satisfactorily. Although she was receiving generally positive performance evaluations, she had committed a number of work rule violations in connection with her care of D.B. and Jacob. Finally, and decisively, she has made no showing that any other employee who was Roman Catholic was treated more favorably than she was under similar circumstances. This failure dooms her suit.

Plaintiff proposed as a fact that she was treated "significantly harsher" than other similarly situated employers who were not Catholic/Christian," but her only support for this proposed fact was "background 'source' materials" purportedly attached to an exhibit "T" that does not exist in the record. Plaintiff says that this exhibit (the elusive "T"), shows that another employee was given four chances before being fired for sleeping on the job and

excessive cell phone usage while with clients; another employee was terminated for theft; and a third employee was given only a written warning for sitting on the job, cleaning only half-heartedly, complaining and talking about family problems. I will assume that the exhibit shows what plaintiff says it does, but it does not help her case. She has not shown either that these employees were treated more leniently than she was, that they were similarly situated in all relevant respects or that any of them were not Catholic.

Drawing all inferences in favor of plaintiff, as I must, I cannot say that she has shown that any genuine disputes of material fact exist for trial on her federal claim of discrimination in violation of Title VII. She has not shown that at trial a reasonable jury could find in her favor on this claim. The Aspirus defendants are entitled to judgment in their favor on this claim.

B. Intentional Interference with Contract

Plaintiff contends that defendant Austin interfered with plaintiff's terminable at will employment contract. Wisconsin law recognizes a tort claim of intentional interference with contract. In Mendelson v. Blatz Brewing Co., 9 Wis. 2d 487, 101 N.W.2d 805, 807 (1960), the state supreme court held that "Wisconsin has aligned itself with the majority in holding that a cause of action is maintainable for unlawful interference with an employment contract terminable at will." Id. at 491, 101 N.W.2d at 807 (citing Johnson v. Aetna Life Ins. Co.,

158 Wis. 56, 147 N.W. 32 (1914)). The court defined the tort using the Restatement definition that "one who, without a privilege to do so, induces or otherwise purposely causes a third person not to perform a contract with another . . . is liable to the other for the harm caused thereby." Id. (citing 4 Restatement, Torts, p. 49, § 766).

Mendelson was before the court on a demurrer to the complaint (the predecessor of the motion to dismiss), in which the plaintiff had alleged a conspiracy among the majority stockholders to have plaintiff fired as general manager and force him to sell his minority shares in the company to defendants for less than they were worth. The court held that these allegations were sufficient to state a cause of action, but noted that the plaintiff would have to show at some point that the defendants acted for an improper motive and outside their privilege. Id. at 492-93. See also Mackenzie v. Miller Brewing Co., 2000 WI App 48, ¶ 63, 234 Wis. 2d 1, 608 N.W.2d 331 (holding that law did not provide employee a cause of action against his employee for intentional interference with prospective employment opportunity, but remanding to trial court question whether facts of case supported claim against individual employee for intentional interference with at will employment), aff'd, 2001 WI 23, 241 Wis. 2d 700, 623 N.W.2d 739; Wolf v. F& M Banks, 193 Wis. 2d 439, 534 N.W.2d 877 (Ct. App. 1997) (holding that workers' compensation act did not preempt claims for intentional interference with employment at will contract).

Defendant Austin argues that this court need not reach the intentional interference

claim because it is time-barred. Plaintiff was terminated on July 17, 2008 and did not file this suit until more than two years later, well after the alleged intentional interference had occurred. Alternatively, defendant maintains that plaintiff cannot establish the elements necessary to substantiate the claim.

Plaintiff's claim is brought under state law; therefore, state law governs the timeliness of the claim. Under Wisconsin law, as it read in 2008, the limitations period for intentional torts was two years. Wis. Stat. § 893.21(2) (2007-2008). (Section 893.21(2) has since been renumbered to § 893.57 and the time limit has been extended to three years for injuries occurring on or after February 26, 2010. 2009 Act 120, § 2(1).)

Plaintiff argues that her claim is saved by the discovery rule, which "tolls the statute of limitations until the plaintiff discovers or with due diligence should have discovered that he or she has suffered actual damages due to wrongs committed by a particular, identified person." Doe v. Archdiocese of Milwaukee, 211 Wis. 2d 312, 335, 565 N.W.2d 94 (1997). She contends that she could not have discovered her claim against defendant Austin more than two years before she filed suit on September 27, 2010. This seems highly unlikely. Clearly, plaintiff knew she was injured when she was fired in July 2008. She says that she did not know at that time either that defendant Austin was responsible for the firing or that Austin had acted with the improper motive of anti-Catholic animus, so she had no evidence that Austin had acted without privilege or justification. This too seems unlikely because

Austin was present at plaintiff's termination hearing. She was one of the three people who let plaintiff know she was being terminated immediately. Unlikely as plaintiff's story is, however, it is not appropriate to determine credibility on a motion for summary judgment. In any event, it is unnecessary. Even if the claim was timely filed, it would fail for lack of legal merit.

The parties agree that the elements of the tort of intentional interference with at will employment contract are the same as those discussed by the Wisconsin Court of Appeals in Briesemeister v. Lehner, 2006 WI App. 140, ¶ 48, 295 Wis. 2d 429, 720 N.W.2d 531, although that case involved a contract to purchase real property. The plaintiff must show that she has a contract; the defendant interfered with the contract; the interference was intentional; the interference caused the plaintiff economic injury; and the interference was not justified or privileged. In this instance, the only element in dispute is the last one, whether defendant Austin's involvement in plaintiff's termination was not justified or privileged.

Plaintiff has made no showing that defendant Austin had any animus toward her because of her religion. However liberally plaintiff's allegations against Austin are interpreted, they do not make out the showing of religious animus that is necessary to support her claim of intentional interference with plaintiff's employment. It is not evidence of religious animus to ask an employee not to discuss her religious beliefs in the workplace;

not to use religious phrases such as "God Bless You"; to refrain from distributing religious literature in the workplace; and generally to be conscious of the religious beliefs and feelings of others, particularly sick patients. The only way such rules would be discriminatory is if they were limited in scope and application to the members of one particular religion. Plaintiff has made no showing that this was the case at Aspirus. She has proved only that she was warned of improper behavior and inappropriate conversations, not that she was the only one subject to the policy or disciplined under it.

Moreover, plaintiff has made no showing that defendant Austin was not privileged to act as she did in warning and disciplining plaintiff. In fact, plaintiff has barely mentioned the possibility. She has not produced any evidence to dispute defendant Austin's showing that she was acting within the scope of her employment and in a manner consistent with defendants Aspirus's legitimate business interests when she followed their policies governing the reporting of personnel matters to supervisory staff at Aspirus and when she took steps to carry out her employers' directives on patient comfort and care.

Because no reasonable jury could find that defendant had an improper motive for interfering with plaintiff's employment or that she was not acting on behalf of her employers when she investigated D.B.'s complaints and made the decision to terminate plaintiff, I conclude that defendant Austin is entitled to summary judgment on plaintiff's state law claim of intentional interference with her at will employment contract.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Aspirus, Inc., Aspirus VNA Home Health, Inc., Asprirus VNA Extended Care, Inc. and Barbara Moskonas Austin, dkt. #95, is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 28th day of November, 2011.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge